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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 497

MARIO MERCADO E HIJOS,
Petitioner,

vs.

ELVIRA OLIVIERI COMMINS ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS, TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF

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PETITION FOR WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS, TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

INTRODUCTORY

Petitioner, Mario Mercado e Hijos, an agricultural civil partnership domiciled in Ponce, Puerto Rico, prays a writ of certiorari to the Circuit Court of Appeals for the First Circuit, to review its order or judgment entered August 23, 1943, affirming, under its Rule 39(b), without a hearing or opportunity for argument on the merits, the judgment of the Supreme Court of Puerto Rico in this case;—or, in the alternative, a writ of mandamus to such

Circuit Court of Appeals, directing it to set aside such order or judgment of August 23, 1943, and to hear and consider and decide on the merits the appeal to it heretofore taken by this petitioner from the Supreme Court of Puerto Rico in this case.

The Rule in Question

Rule 39(b) of the First Circuit Court of Appeals, adopted in the Revision of that Court's Rules effective September 20, 1940,—nine months after this Court's decision, January 2, 1940, in *Sancho Bonet, Treasurer, vs. Texas Company*, 308 U. S. 463, 470-472,—reads as follows:

> "(b) In appeals from the Supreme Court of Puerto Rico involving only questions of local law the appellant shall be required to show in his statement on appeal that the judgment appealed from is 'inescapably wrong' or 'patently erroneous'. (*Sancho Bonet* v. *Texas Co.*, 308 U. S. 463 (1940)). The court will entertain a motion by the appellee to affirm on the ground that it is manifest from the record and the statement on appeal that the judgment below was neither 'inescapably wrong' nor 'patently erroneous', and consequently should not be disturbed by this court. Such motion, which may be united in the alternative with a motion to dismiss the appeal, may be filed within twenty days after the filing and serving of the statement on appeal. A brief in support thereof may be filed and furnished in the manner specified by Rule 25. The court may, however, upon its own motion, dismiss the appeal or affirm the judgment appealed from where the law and justice of the case so require; or, if the case is of such character as not to justify extended argument, the court may order the cause set down for immediate hearing."

Questions Presented

1. Is the foregoing rule valid? May the Circuit Court of Appeals thus abdicate the jurisdiction over appeals from the Supreme Court of Puerto Rico, vested in it by

the Congress by Section 128 (a) "Fourth" of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936; or the duty to hear and to consider and decide such appeals on the merits, upon briefs and arguments, in the same way as in other cases?

2. Was the decision of the insular Supreme Court of Puerto Rico so manifestly correct as to make any appeal from it necessarily "frivolous" and thus to warrant dismissal of the appeal without a hearing, on mere inspection of the face of the record, as was done by the Circuit Court of Appeals in this case?

3. Or, on the contrary, is not the decision of the insular Supreme Court in this case so "patently erroneous",—and, indeed, so "inescapably wrong",—as to require reversal at the hands of the Circuit Court of Appeals, or of this Court? *Or, in any event,* is there not presented by this record a *substantial question* of whether or not the insular Supreme Court's decision was not in reality "clearly wrong", or "patently erroneous", or, indeed, "inescapably wrong", within the meaning of this Court's decisions,—a question of sufficient substance, at least, to entitle the appellant [petitioner] to have it argued and considered and decided on the merits by the Circuit Court of Appeals, or by this Court?

Statement

This case originated in a petition to the Insular District Court of Ponce, Puerto Rico ("Civil Case" No. 311; R. 1-12), filed April 7, 1937, seeking the rescission of a sale the month before, March 9, 1937, from the respondent, Elvira Olivieri Commins, to the other respondents, of the plantation or estate known as "Indios," as having been fraudulently made, in direct violation of an option to purchase the property at the same price offered by any other purchaser [and requiring 30 days' notice of any offer, and an opportunity during that time to purchase at

the same price offered], held by the petitioner plaintiff, of which all the respondents were aware.

There is also a companion case filed the same day ("Civil Case" No. 312; R. 35) for the rescission of a lease likewise made by Mrs. Commins, the same day as the sale, March 9, 1937, to her nephew, Dr. Emilio Blasini Totti, and his wife, Mrs. Celia Lluberas Passarell, two of the respondents in the present case. Dr. Blasini's wife, Celia Lluberas Passarell, is a sister of the respondent, Manuel Francisco Lluberas Passarell, and of the other respondents, Antonia, Rosa Elena, Graciela, and Raquel Lluberas Passarell.

A chronological analysis of the facts is in Appendix II, following our Supporting Brief (infra, pp. 37-48).

The gist of the story is that in March, 1932, Mrs. Commins applied to the petitioner, Mario Mercado e Hijos, an "agricultural partnership," for a loan of something over $40,000.00 on her undivided half interest in two plantations or estates in Puerto Rico, "Indios" and "Juanita," then owned jointly by herself and her sister Santia. The Mercado partnership was the tenant of both estates, and had been for several years, under ten-year leases, made back in 1927 and in 1928. Half of the term of the "Indios" lease had thus already run. It would expire in June, 1937; that of "Juanita" had one year more to run, until 1938. The Mercado partnership was, of course, looking forward to the permanency of its enterprise, and thus interested in the future of these lands; particularly since they adjoined other lands owned by itself, as appears from their legal descriptions (R. 322-323), so that these lands that it held under lease were so situated as to be cultivated in connection with its own lands, in a single agricultural enterprise. Under these circumstances, when Mrs. Commins asked the loan [quite probably really a renewal of a former loan], the partnership wanted to be assured that in case she, or the sisters, should wish to sell the lands at any time, the partnership could have the right to buy them—or, if they were not sold, then to renew its

leases, at the same price that anyone else might offer. So the loan was made for seven years, upon promissory notes payable to "the bearer by endorsement" secured by a mortgage not specifically naming any particular mortgagee, but with a right to Mrs. Commins to pay it off at any time before maturity, upon three months' notice. And the option to the Mercado partnership to purchase or to renew its leases upon the same terms that anybody else might offer was agreed upon; and also that no partition of the lands should be made between the sisters, while the mortgage remained in force, without the consent of the Mercado partnership.

But instead of drawing two or three separate instruments embodying those different agreements, they were all put into one instrument of "voluntary mortgage" or deed for the public records (R. 322; Exhibit "J");—[although the option for the benefit of the Mercado partnership to secure the future of its agricultural enterprise was plainly no part of the security to the "bearer" notes secured by the mortgage; but was an independent major consideration to the partnership, inducing it to make the loan].

The next year, in May, 1933, the Mercado partnership sold the "bearer" promissory notes to the heirs of Jose Tous Soto, deceased, but with some reservations. It appears that the guardian's purpose in purchasing was to provide a regular monthly income for the heirs, some of whom were minors at that time. Mrs. Commins' "bearer" promissory notes bore interest at 9% per annum, payable semi-annually, as above noted. But in order to get a secure income for the heirs, in such form that they could receive it regularly every month, the guardian,—with the approval of the District Court in the guardianship proceedings,—was willing to accept a slightly lesser rate of income than the 9%; *provided* it could be made payable monthly, and absolutely guaranteed. And so the arrangement was made, and embodied in a formal deed approved by the court and recorded, dated May 9, 1933, by which the Mer-

cado partnership assigned to the heirs the "mortgage credits," by delivering to them the "bearer" promissory notes, and absolutely guaranteeing, itself, to pay to them in *monthly installments* an amount equal to 8¼% per annum on the notes; and, in consideration of such guarantee, was itself "*entitled to retain*" ¾ of 1% out of the 9% semi-annual interest on the notes. (Deft.'s "Exhibit 2," "*Third*"; R. 397, 406).

This, of course, left in the Mercado partnership a substantial, active, interest in the Commins indebtedness; and apparently contemplated that the partnership would continue to collect the semi-annual interest itself, and would itself pay over the monthly installments to the heirs at the stipulated lesser rate of 8¼%. No formal assignment of the mortgage deed was made; and nothing was put on the public records at that time specifically mentioning the Mercado partnership's option or its right to be consulted and to be asked for its "consent" to any partition of the lands between Mrs. Commins and her sister,—the provisions of Paragraphs "Seventh" [the option] and "Eleventh" [consent to partition] in the original March, 1932, deed.

And it was clearly understood between the parties that, in fact, the option was not intended to be assigned, but was reserved to the Mercado partnership, as was also the right to be consulted and to give its "consent," upon any partition of the lands. The heirs themselves expressly affirmed that this was the understanding, by formal deed approved by the District Court in the guardianship proceedings, four years afterward; apparently as soon as the question was called to their attention [deed of March 31, 1937; Exhibits "E" and "F"; R. 281, 284; 286, 291-301).] And that such was actually the understanding at the time, was shown on the public records later on, by the fact that upon the partition of the lands between Mrs. Commins and her sister three years afterwards, on August 20, 1936,—before any of the questions here involved had arisen,—*it was the Mercado partnership,*—and not the Jose Tous Soto heirs,—*who appeared with the parties in the formal parti-*

tion deed for the purpose of giving its "consent" to the partition under Paragraph "Eleventh" of the original 1932 deed. (District Court's Findings of Fact; R. 38.)

And the District Court itself expressly found in its "Findings of Fact" (R. 39), copied also with approval by the insular Supreme Court in its opinion (R. 481-482), *that all the respondents were in fact aware* that such was really the understanding, and *that the option was still the property of the Mercado partnership.* [A copy of the 1933 assignment to the heirs had been given to Mrs. Commins at the time; R. 37].

It appears that shortly after making the partition of the lands with her sister in August, 1936, Mrs. Commins began to think about selling the part that had thus come to her.

Although the mortgage still had considerably more than two years yet to run until its maturity on March 23, 1939, yet, as early as December, 1936, only a few months after the partition, Mrs. Commins was writing to Mario Mercado about it; and, as the District Court finds, from then on she was negotiating about it with the Mercado partnership through her son-in-law, Rafael Barletta; and she kept up these negotiations until the very day that she closed the sale and lease here assailed, to other parties, the respondents here; without giving any notice to the Mercado partnership that she had even had any other offer, or that she was dealing with anyone else at all,—despite the option held by the partnership, of which, as the District Court found, as above noted, not only she herself, but also all the other respondents, were aware, and despite the fact that the partnership stood ready to pay the same amount as any other purchaser or to renew its leases for a future term on as favorable a rent and conditions as anyone else might offer. (*Findings;* R. 38-39; 481.)

The explanation is that some time along in January or early February, 1937, Mrs. Commins happened to have a talk with an old friend, Mrs. Elena Passarell-de-Delgado, the mother of the respondents Manuel Francisco, Antonia

Rosa Elena, Graciela, Celia, and Raquel Lluberas Passarell, —whose daughter Celia is married to Mrs. Commins' nephew, Dr. Emilio Blasini Totti, likewise one of the respondents here. It is an old family friendship and connection. Mrs. Elena Passarell de Delgado's ["Dona Elena's"] husband, then recently deceased, had been candidate for Mayor of Ponce, and apparently an influential man. Mrs. Commins had known the younger members of the family practically ever since their birth.

This talk was had while Mrs. Commins' negotiations with the Mercado partnership were under way for a sale or a new lease of the properties to it. [It will be remembered that its ten-year lease of "Indios" was to expire in the following June, 1937; and that of the other estate, "Juanita", the next year. But that Mrs. Commins' mortgage loan still had more than two years to run, until March 23, 1939.]

"Dona Elena" offered her friend Mrs. Commins ["Dona Elvira"] $40,000.00 for "Indios", for the benefit of Dona Elena's children, respondents here, *provided* that Mrs. Commins would also lease to the latter's own nephew, Dr. Emilio Blasini Totti (husband of Dona Elena's daughter Celia), the other estate, "Juanita", for ten years after the expiration of the Mercado partnership's lease.

Mrs. Commins wanted to accommodate her friend, and to benefit her nephew and the family connections. She preferred them to have the property, rather than to have it go to the partnership on the same terms,—(although her relations with the partnership were also friendly, up to that time).

To accomplish this purpose, and to evade the partnership's option, they resorted to the trick of having Mrs. Commins give a $45,000.00 mortgage to Manuel Francisco Lluberas Passarell on February 25, to run for only six months, and allowing him, as special attorney in fact for Mrs. Commins, to retain the whole $45,000.00 in his hands; and then he turned around, and,—[apparently with money furnished by his mother, Dona Elena, as a gift for the benefit of her children],—paid the amount of the old 1932 mort-

gage indebtedness to the Jose Tous Soto heirs, together with three months' interest in advance because of the loan's being paid two years before maturity,—[and apparently *not calling their attention* to the facts that they were entitled to three months' notice before such a payment in advance, and that the Mercado partnership as holder of a part of the mortgage indebtedness (*its 3/4 of 1% per annum share of the interest under the 1933 assignment*),—as well as because of its rights under the option,—was likewise entitled to the notice,—but, instead, threatening the heirs with a suit if they did not immediately cancel the mortgage][1],—and thus secured a deed of cancellation of the mortgage (Exhibit I, recorded March 8, 1937; R. 312-321).

With that cancellation in hand,[2] the trap was sprung. The deed of sale to Manuel Francisco Lluberas Passarell and his sisters, of "Indios",—and the lease to Mrs. Commins' nephew, Dr. Blasini (whose wife, Celia, is one of the sisters),—of the other estate, "Juanita",—were executed and put on record the very next day, March 9, 1937.

The Mercado partnership, this petitioner, promptly made a formal demand for the rescission of the deed and the lease, and to be subrogated to the respondents as purchasers and lessee, respectively, under its option; and offered payment of the same purchase price received from the others; and upon refusal deposited the money in court, and began these suits.

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[1] A threat for which there was no possible basis whatever, particularly in view of the mortgagees' right to three months' notice before accepting an advance payment. (Clause "Ninth"; R. 327).

[2] Thus procured behind the backs of the Mercado partnership, without any notice to them whatever, and at the very time when Mrs. Commins, through her son-in-law, Barletta, was actually carrying on negotiations with the partnership for a sale or for a renewal of the leases to them. [Finding of the District Court R. 38-39; see also R. 130-135; 142-147; 179-181 and 381-383; and also Appendix II, *infra* pp. 44-46].

District Court's Opinion

The District Court sums up the pleadings in its opinion ("Statement of the Case," R. 31-35); and finds the facts ("Findings of Fact," R 36-39) with substantial accuracy, so far as its findings go; but it omits to mention or make any findings upon several of the essential facts. It is noteworthy that it does find, however, among its other findings, that, as above indicated, before the sale and the lease in question executed March 9, 1937, all the respondents actually

> *"were advised", "of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates 'Juanita' and 'Indios'* (R. 39);

and that neither Mrs. Commins nor any of the other respondents ever notified the petitioner that they contemplated any sale or lease of the properties (R. 38); and also that the petitioner partnership "always was and is now ready to subrogate itself to the place of the purchasers and lessees of said estates for the same price and rental and on the same terms as those of the contract of sale and lease whose rescission is hereby sought" (R. 38-39).

And also further that (R. 39), from Mrs. Commins' own testimony,

> "it appears as a fact that she authorized her son-in-law, Rafael Barletta, to enter into negotiations with Mario Mercado e Hijos for the lease or sale of the estates Juanita and Indios";

and that from other testimony and from telegrams and letters in evidence, it likewise appears "as a fact" (R. 39, *supra*), that from the preceding December, 1936, all through the winter, and up to March [3] 8, 1937,—the day before the

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[3] The Opinion reads "*May*" 8; but this is clearly a clerical error. It should read "*March* 8." (Confer, Footnote, p. 42, *infra*, Appendix II, p. 43).

actual execution of the sale and lease to the other respondents,—this son-in-law, Rafael Barletta, had been actually holding conversations and meetings with the manager and other officials of this partnership petitioner, "in regard to the possible purchase and lease of said immovables from Elvira Olivieri Commins to the plaintiff partnership."

Nevertheless, the District Court found against the petitioner, and refused to set aside the March 9, 1937, sale and lease; **simply on the legal ground** that the option, although running specifically to this petitioner partnership, by name, had originally been included as clause "Seventh" in the same deed by which a "voluntary mortgage" was constituted by Mrs. Commins on March 23, 1932, to secure her four seven-year mortgage notes payable to bearer, aggregating $41,256.89, originally held by the petitioner partnership but afterwards assigned by it, the next year, May 9, 1933 [although with some restrictions of record in the assignment deed][4] to the heirs of, Jose Tous Soto, deceased, and that in thus assigning the notes ("mortgage credits") the petitioner had neglected to recite of record, in the formal deed of assignment filed for record in the Public

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[4] Including the right to "*retain*" ¾ of 1% per annum of the interest on the notes, which were payable semi-annually, this retaining being expressed to be in consideration for the partnership's undertaking to pay the amount of the balance of the interest over to the assignees in *monthly installments,* instead of only semi-annually as it was collected from Mrs. Commins, and also absolutely to guarantee the Heirs both the principal and interest and the payments in such monthly installments, and also to protect them against any taxes, federal, insular or municipal, that might be levied upon it at any time,—so as certainly to secure to the heirs a steady monthly income in any event. This, which appeared of record in the Public Registry, manifestly contemplated that the assignor partnership, the petitioner here, should *retain an active interest in the mortgage deed,* and was not assigning the whole instrument outright. [*Confer* Appendix II, *infra,* pp. 40-42].

Registry, in so many words, the fact that it was not assigning, but on the contrary was reserving to itself, the option running specifically in its own favor in the independent clause "Seventh" in the original deed of 1932 (R. 40-42);—[*although*: (1) The Court itself expressly found, in its "Findings of Facts" as above stated, that all of the respondents did actually know, before the making of this March 9, 1937, sale and lease, that the petitioner-partnership really still owned the option itself, and had not transferred it; and despite (2) The fact that the Jose Tous Soto heirs themselves, the assignees of the mortgage notes, had acknowledged in a solemn deed of record made on March 31, 1937 (Exhibits "E" and "F", *supra; ante,* p. 6), as soon as their attention was called to this question,—[and with the formal approval of the District Court in guardianship proceedings on behalf of one of the heirs who was a minor and another who was "incapacitated"],—the fact that this option had actually been so reserved by the partnership in making the original assignment in 1933 (R. 281, 284; *confer* Appendix II, *infra,* pp. 41-42); and although (3) Insofar as the public notice in the Registry might have any bearing at all in a case like this, where there was actual notice by all of the parties concerned,—the requisite notice of record of the fact of the partnership's still continuing ownership of the option and its active rights and interest in the original deed of 1932, was shown of record in the partition deed made August 20, 1936, between Mrs. Commins and her sister, Santia,—*three years after the assignment of the mortgage notes, as above, to the Jose Tous Soto heirs,*—in which the plaintiff partnership, Mario Mercado e Hijos, *and not the heirs of Jose Tous Soto,*—appeared and took part as being the party consenting to the partition, under clause "Eleventh" (R. 5) of the original 1932 deed.[5]

[5] Respondent-defendants' own answers in the District Court each specifically admit plaintiff's allegation that it was the petitioner partnership who thus "gave its consent to the said partition." (Complaint, Par. 10, R. 8; Answers; Par. "Tenth," R. 22; Par. "Sixth," R. 27).

The District Court none-the-less concludes that (R. 42):

> "when Mario Mercado e Hijos conveyed to the heirs of Tous Soto the mortgage credit, it also conveyed the rights embodied in clause 7 of the option to sell and lease."[6]

In support of this conclusion, the District Court relied upon Article 152 of the Mortgage Law and Section 1418 of the Civil Code of Puerto Rico, and referred also to Sections 1233, 1235, and 1759 of the Civil Code, and Section 26 of the "Law of Evidence"; and also to five decisions of the Supreme Court of Puerto Rico, none of which really appears to support it at all, as is pointed out in our Supporting Brief (*infra*, pp. 23-27).

The insular Supreme Court, after noting that it had denied the respondents' (Appellees' in that Court) motion to dismiss petitioner's appeal to it, because the appeal presented *substantial questions that "were not plainly frivolous"* (R. 475), copied (R. 478-486) the District Court's "Findings of Fact" and determination of the "Questions of Law," *supra*, and held (R. 487):

> "If the plaintiff when assigning its promissory notes to the Heirs of Tous Soto had expressly reserved to itself the right of option, and if when recording the

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[6] But in saying this the Court also manifestly overlooked the fact that there is no pretense that any notice of the contemplated sale and lease of March 9, 1937, was ever given to the Jose Tous Soto heirs, any more than to the partnership itself, by any of the respondents. It is perfectly manifest that if any such notice had been given to those heirs they would have transmitted it to the plaintiff partnership which they themselves clearly recognized as still retaining the option, and therefore as entitled to the notice. Nobody has ever even suggested that the assignment to the heirs ever *cancelled* the option. It was still in existence, and was certainly owned either by the partnership or else by the heirs; and hence, either one or the other was entitled to the notice. *But no notice was ever given to anybody.* (*Confer* Supporting Brief, *infra*, Point III, pp. 27-28.)

> assignment it had recorded such reservation in the registry, then it would have been entitled to claim knowledge of such reservation on the part of defendants with all the consequences that might arise as against them";

thus in its turn completely ignoring,—as had likewise the District Court,—the express finding of the District Court,—[which the Supreme Court itself had copied with apparent approval, in its own opinion (R. 481-482],—that both Mrs. Commins and also all of the other respondents *had actually had full notice,*—

> "were advised, prior to the execution of the contract of sale and lease, of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates Juanita and Indios."

Judgment of the Circuit Court of Appeals

The plaintiff, this petitioner, appealed from the insular Supreme Court to the Circuit Court of Appeals, First Circuit (R. 490-491), and filed its "Statement of Points" (R. 495-498) and its "Statement on Appeal" (R. 498-513) in that Court, both on March 26, 1943.

Respondents, appellees there, appeared and filed on April 12, 1943, their "motion to docket and dismiss" (R. 514-517) on the ground that the appeal involved only questions of local law, and that (R. 517) a "simple reading of the Opinion of the Supreme Court of Puerto Rico" should be enough to convince the Circuit Court of Appeals that the judgment "is not in any respect wrong", and "that the appeal has been taken to hinder and delay and is against the administration of justice."

Upon that basis, the Circuit Court of Appeals, without affording appellant [petitioner] any opportunity for full hearing or argument, entered its order or judgment on August 23, 1943, granting appellees'-respondents' motion, and ordering (R. 518) that:

"Upon consideration of the statement on appeal filed by appellant on March 26, 1943, the motion to dismiss filed by appellees on April 12, 1943, the memoranda filed by the parties thereon, and the typewritten transcript of record in this case, it is now, to wit, August 23, 1943, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is affirmed, under Rule 39(b)."

Statutes

Pertinent constitutional and statutory provisions, federal and insular, are in Appendix I (*infra*, pp. 33-36).

Petitioner's Position

Petitioner believes, and submits;

First. This case presents a substantial question, worthy of consideration on its merits, upon full briefs and argument in the usual way, by the Circuit Court of Appeals, as to the correctness of the decision of the insular Supreme Court. It is believed that that decision was clearly wrong, "patently erroneous," and even "inescapably" so; and that petitioner was entitled to have the question of whether or not it really was so, considered by the Circuit Court of Appeals, upon full argument.

Second. Rule 39(b) of the Circuit Court of Appeals for the First Circuit, adopted September 20, 1940, shortly after the decision of this Court on January 3, 1940, of the case of *Sancho Bonet, Treasurer, vs. Texas Co.*, 308 U. S. 463, 470-472, reflects a misunderstanding by that Circuit Court of the decisions of this Court in the *Sancho Bonet, Treasurer, vs. Texas Co.* case and in the earlier case of *Sancho Bonet, Treasurer, vs. Yabucoa Sugar Co.*, 306 U. S. 505, 509-511.

This Court did not in those cases indicate any intention to change in any way the rule as to the respect to be accorded to the decisions of a Territorial court of last resort concerning questions of fact or of local law, that had been

unvaryingly recognized and enforced by this Court for more than sixty years previously, alike in cases coming from the old Territories within the continental United States, and, since 1898, from Hawaii, the Philippines, and Puerto Rico.

So far from expressing any intention to vary that rule, this Court expressly said in the *Sancho Bonet vs. Texas Co.* case, *supra*, (at p. 470);

> "For over sixty years this Court has consistently recognized the deference due interpretations of local law by such local courts unless they appeared to be clearly wrong. From *Sweeney v. Lomme*, 22 Wall. 208, decided in 1874, to *Bonet v. Yabucoa Sugar Co., supra*, decided in 1939, repeated admonitions to that effect have been given. That rule is founded on sound policy."[1]

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[1] *Confer: Sweeney v. Lomme, supra*, 22 Wall. 208, 213; *Northern Pacific R. R. Co. v. Hambly*, 154 U. S. 349, 361; *Fox v. Haarstick*, 156 U. S. 674, 679; *Copper Queen Consol. Min. Co. v. Territorial Board of Equalization*, 206 U. S. 474, 479; *Lewis v. Harrea*, 208 U. S. 309, 314; *English v. Arizona*, 214 U. S. 359, 361; *Santa Fe County v. New Mexico*, 215 U. S. 296, 305; *Albright v. Sandoval*, 216 U. S. 331, 339; *Lewers & Cooke v. Atcherly*, 222 U. S. 285, 294; *Treat v. Grand Canyon R. R. Co.*, 222 U. S. 448, 452; *Ker & Co. v. Couden*, 223 U. S. 268, 279; *Clason v. Matko*, 223 U. S. 646, 653; *Gray v. Taylor*, 227 U. S. 51, 57; *Cordova v. Folgueras*, 227 U. S. 375, 378-379; *Phoenix R. R. Co. v. Landis*, 231 U. S. 578, 579-580; *Texas & Pacific R. R. Co. v. Railroad Commissioner*, 232 U. S. 338; *Santa Fe C. R. Co. v. Friday*, 232 U. S. 694, 700; *Nadal v. May*, 233 U. S. 447, 454; *Gilson v. United States*, 234 U. S. 380, 383, 384; *Villanueva v. Villanueva*, 239 U. S. 293, 298-299; *Diaz v. Gonzalez*, 261 U S. 102, 105-106; *Fernandez vs. Ayllon*, 266 U. S. 144, 146; *Matas vs. Alonso Hermanos*, 300 U. S. 429, 432; *Wailau Co. v. Christian*, 305 U. S. 91, 109; *Inter-Island Co. v. Hawaii*, 305 U. S. 306, 311; *all leading up to the emphatic statement of the same rule in Sancho Bonet, Treasurer v. Yabucoa Sugar Co., supra*, 306 U. S. 505, 509-511; *and in Sancho Bonet, Treasurer v. Texas Co., supra*, 308 U. S. 463, 470-472.

Third. Throughout all those years, and in all those cases where under the old statutes a direct appeal from the Territorial supreme courts lay to this Court [and in later cases from the Philippines in cases where a direct appeal lay to this Court], this Court, while always consistently recognizing and applying this rule of the respect to be accorded to decisions of the Territorial courts of last resort upon questions of fact and of local law, yet appears never to have failed to examine carefully and at length, and upon full briefs and argument, as in any other case, any appeal coming to it as of right, under the Act of Congress, from any Territorial court of last resort; and so likewise the Circuit Courts of Appeal for the Ninth Circuit, and for the First Circuit, since having had vested in them respectively, by the Congress, jurisdiction over appeals from the Supreme Courts of Hawaii and of Puerto Rico, have steadily and consistently in applying such rule, and in citing and following the decisions of this Court recognizing and enforcing it, patiently examined and heard on briefs and full argument, as in any other case, all appeals coming to them as of right under the Acts of Congress from those courts respectively,[8]—*with the sole exception of the new practice now adopted in the First Circuit* under this new Rule 39(b) of that Circuit, here involved.

Fourth. The Circuit Court of Appeals for the First Circuit has itself, even since the adoption in 1940 of this Rule 39(b), recognized and acted upon its statutory duty under the Act of Congress to entertain appeals from the

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[8] *Confer: Richardson v. Fajardo Sugar Co.*, 237 Fed. 195, 196; *Loiza Sugar Co. v. People of Puerto Rico*, 57 F. (2d) 705, 706; *Porto Rico Coal Co. v. Domenech*, 41 F. (2d) 183, 185-186; *Russell & Co. v. Sancho Bonet, Treasurer*, 92 F. (2d) 821, 822; *Hawaii Consol. Co. vs. Borthwick*, 105 F. (2d) 286, 288; *Walker vs. O'Brien*, 115 F. (2d) 956, 957.

Supreme Court of Puerto Rico; even although saying that under this established rule of this Court as to the respect to be accorded to the decisions of Territorial supreme courts in local questions: "Appeals in such cases are therefore likely to be futile and merely to cause needless delay and expense". *De La Torre v. National City Bank*, 110 F. (2d) 381, 383; and see also, *Same Case*, 110 F. (2d) 976, 983; and likewise the recent case, decided June 14, 1943, of *DeCastro v. Board of Commissioners of San Juan*, 136 F. (2d) 419, 425-426.

In the *De La Torre case, supra*, that Court in denying a motion there made to dismiss the appeal on this very ground that the case involved "purely a question of local law," said (110 F. (2d) 381, *supra*, at p. 383);

> "under Section 128 of the Judicial Code, 28 U. S. C., Section 225, appeal to this Court is conferred as a matter of right, provided the jurisdictional requisites are present. We cannot therefore dismiss the appeal on the first ground urged by appellee."

And in the recent *De Castro* case against the *Board of Commissioners of San Juan, supra*, that court again, while very strongly expressing its feeling that under the rule of this Court its functions, in passing upon appeals from the Supreme Court of Puerto Rico, may be reduced to requiring it "to act practically as a rubber stamp, or else to be reversed by the Supreme Court of the United States," nevertheless recognized and acted upon its statutory duty to entertain the appeal, saying (136 F. (2d) 419, *supra*, at p. 425);

> "But as the law now stands litigants bring these cases to us as a *matter of right*, and we have to pass on them." (*Italics supplied.*)

Those recent decisions of that Circuit Court itself appear to recognize the impropriety and the invalidity of its Rule 39(b) here in question; as well as the jurisdiction, and con-

sequently the duty, of that court to hear cases coming from the insular Supreme Court of Puerto Rico, in just the same manner as it hears cases coming to it on appeal from other courts.

Fifth. When a court possesses jurisdiction, *it is its duty* to exercise its jurisdiction, and to proceed to hear the case. It may not abdicate its jurisdiction; nor deny to an appellant bringing an appeal within its jurisdiction from one court, the same kind of full hearing that it grants to appellants bringing to it appeals within its jurisdiction from other courts. To do so is to deny to such appellants from the one court the equal protection of the laws, and due process of law.

And the duty of a court to exercise its jurisdiction may be enforced by mandamus. *Ex parte Kawato*, 317 U. S. 69, 71; *Roche v. Evaporated Milk Association*, 319 U. S. 21, 26, 32; *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 546; *McClelland v. Carland*, 217 U. S. 268, 279-282; *Ex parte Bradley*, 7 Wall. 364, 376; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 270-271; *Ex parte Russell*, 13 Wall. 664, 669-671; *Ex Parte Simons*, 247 U. S. 231; *Hudson v. Parker*, 256 U. S. 277, 288-289.

Sixth. It follows that it was the duty of the Circuit Court of Appeals in the present case, despite its "Rule 39(b)", to hear on full briefs and argument this appeal coming to it from the Supreme Court of Puerto Rico, in the same way that it hears appeals within its jurisdiction coming to it from other courts; and that it was grave error to sustain appellees' (respondents') motion to dismiss the appeal, and to affirm, *pro forma*, the judgment of the insular Supreme Court, without giving to this petitioner-appellant the opportunity for a full hearing.

Seventh. The decision of the insular Supreme Court of Puerto Rico was clearly wrong, and should be reversed, for the reasons hereinbefore indicated, and stated more at length in the Supporting Brief (*infra*, pp. 23-29), and in petitioner's (appellant's) "Statement of Points" in the Circuit Court of Appeals (R. 495-498).

Reasons for Granting the Writ

This case presents an important question of federal law, of the validity and application of this Rule 39(b) of one of the Circuit Courts of Appeal [the First Circuit], which has not been, but it is believed should be settled by this Court. The practice followed by that Court in this case under that Rule, of denying to the appellant in an appeal coming to it under its statutory jurisdiction from the insular Supreme Court of Puerto Rico, the same opportunity for a full hearing upon briefs and oral argument which is accorded by it to appellants in other cases within its jurisdiction coming to it from other courts, is believed to be a denial of due process of law and of the equal protection of the laws, and to be such a departure from the accepted and usual course of judicial proceedings, and to be so in conflict with the applicable decisions of this Court, as to call for the exercise of this Court's power of supervision, and the issuance of a writ of certiorari, or in the alternative of a writ of mandamus, to that end.

The decision of the insular Supreme Court of Puerto Rico was clearly wrong, and should be reversed.

It is therefore respectfully requested that this petition be granted, and that a writ of certiorari issue,—or in the alternative a writ of mandamus,—to the Circuit Court of Appeals for the First Circuit, and that upon a hearing the judgment of the Supreme Court of Puerto Rico affirming that of the District Court of Ponce, Puerto Rico, be reversed, and that petitioner-plaintiff be granted the relief prayed in its two original petitions Nos. 311 and 312, in the District Court of Ponce.

Respectfully submitted

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BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the insular District Court of Ponce ("Statement of the Case and Opinion of District Court"; R. 31-44) is not officially reported. The Opinion of the Supreme Court of Puerto Rico, July 31, 1942 (R. 474-487) is reported in 60 P. R. Dec. 877 (*Spanish edition*). It has not yet appeared in the English edition of the Puerto Rico Reports.

There is no written opinion by the Circuit Court of Appeals. Its "judgment" of August 23, 1943 (R. 518) upon the "motion to dismiss" filed by appellees there (the respondents here), by which it is

> "here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is affirmed, under Rule 39(b),"

has not yet appeared in the Federal Reporter.

The former opinion of the insular Supreme Court of Puerto Rico, which was adverse to the respondents here and favorable to this petitioner, denying ejectment to the respondents, to which reference is several times made in the transcript of the record here (R. 475, 496, 498), is reported in 55 P. R. Dec. 41 (*Spanish edition*), but has not yet appeared in English edition of the Puerto Rico Reports.

Jurisdiction

The jurisdiction of this Court to issue the writ of certiorari is invoked under Section 240(a) of the Judicial Code of the United States as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

Its jurisdiction to issue the writ of mandamus is invoked under this Court's inherent constitutional power to issue the recognized common law writs in aid of its appellate jurisdiction.

More than $5,000.00 is involved, as is expressly admitted also by the respondents themselves (R. 498-499, 513, 515).

Questions Presented

The questions here presented are stated in the petition ("Questions Presented", *ante*, pp. 2-3).

Statutes

As is indicated in the Petition (*ante*, p. 15), pertinent constitutional and statutory provisions, federal and insular, are in Appendix I (*infra*, pp. 33-36).

Specification of Errors To Be Urged

These are indicated under the headings "Questions Presented", "Petitioner's Position", and "Reasons for Granting the Writ" in the Petition (*ante*, pp. 2-3, 15-19, 20).

Summary of Argument

The argument is summarized under the headings "Petitioner's Position" and "Reasons for Granting the Writ" in the Petition (*ante*, pp. 15-19, 20); and in the "Subject-Index" preceding it (*ante*, pp. I-II).

Statement of the Case

The case is stated in the Petition ("Statement," *ante*, pp. 3-9). A chronological analysis of the facts is in Appendix II (*infra*, pp. 37-48).

Opinions of the District Court of Ponce and of the Supreme Court of Puerto Rico

The gist of the opinions of these Courts is summarized in the Petition (*ante*, pp. 10-14).

ARGUMENT

First

The judgment of the Supreme Court of Puerto Rico was clearly wrong; even "patently erroneous", or "inescapably wrong."

Point I

A. **The District Court ignored its own finding that all of the respondents had express actual knowledge of this petitioner's ownership of the option**, and wrongfully applied the rules of the mortgage law concerning recording in the registry which could only have been applicable in the absence of such actual notice; and it misapplied the rule of Section 1418 of the Civil Code relating to the interpretation of contracts when the parties to a contract differ among themselves as to its meaning; so as improperly to hold in this case, where is no misunderstanding or difference between the parties themselves as to the meaning of this 1933 assignment, that it meant something wholly different from what either of the parties themselves understood it to mean—[and of which all the respondents here also actually had notice, as the Court itself had just found in its "Findings of Fact"; viz., that the option was not intended to be assigned but was reserved and still owned by this petitioner],—the Court nevertheless holding that it was constrained by Section 1418 of the Civil Code to construe the assignment of the mortgage notes as necessarily carrying the option with it, despite the contrary intention of both parties to the contract.

B. In so holding the District Court relied upon the provisions of the first clause of Section 1233 of the Civil Code directing that: "If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed" (Appendix, *infra*, pp. 33-34). But in so holding the Court ignored both the provision of the second clause of the same Section 1233 that:

> "If the words should appear contrary to the evident intention of the contracting parties, *the intention shall prevail*" (*Italics supplied*);

and also the similar provisions of the next succeeding sections of the Code, Sections 1234, 1235, 1236, 1237, 1238, and 1239 (Appendix, *infra*, p. 34) emphatically directing that *it is the actual intention of the parties* at which the Court should endeavor to arrive.

C. And in this holding the Court also, without any discussion or analysis of the 1933 assignment deed, *in assuming* that its words "are very explicit and do not leave any room for doubt as to the intention of the contracting parties" (R. 40) not only completely ignores the fact which it had itself found that the mutual intention of both the contracting parties was that its meaning was directly to the contrary of what the Court is here assuming concerning it; but also completely ignores the terms of the instrument itself, insofar as, on its face, it did not purport to be a complete outright assignment of the mortgage, but, on the contrary, an assignment only of the mortgage "in part"[*], expressly reserving to the assignor, the Mercado partnership, the right to "*retain*" a portion of the interest on the notes in consideration of its undertaking a new obligation to pay (and absolutely to guarantee the payment of) *monthly* installments of the interest to the heirs, which interest it could itself collect only *semi annually* from Mrs. Commins, the mortgagor. This significant provision, in addition to the fact of nothing whatever being said in that instrument regarding either the option under clause "Seventh" of the 1932 mortgage, *running directly to the Mercado partnership*, and *not to the holders of the mortgage notes*,—or as to the right to be consulted and asked to "consent" in case of any proposed partition of the

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[*] "in part": The wording of Article 152 of the Mortgage Law.

lands between Mrs. Commins and her sister Santia, which the Court also completely ignores.

D. *The Court also in that connection likewise completely ignores the practical construction of that assignment instrument which was put of record,* and became notice to the world on the public Registry, *when, three years later,* on August 20, 1936, upon the partition of the lands between the two sisters, *it was the Mercado partnership,* and not the Jose Tous Soto heirs, *which took part,* "intervened", *in the partition deed for the purpose of giving its "consent" to the partition,* as even the respondents themselves all expressly admit in their several Answers in the District Court (R. 22, Par. "Tenth"; R. 27, Par. "Sixth").

E. The Court very clearly erred in this holding that the recording laws, the Mortgage Law,—or the Civil Code of Puerto Rico,—were intended by the Legislature to, or do actually, override the mutual intentions of the parties to a contract, where there is no misunderstanding or difference of opinion between the parties themselves about it, and where all the other parties to the case actually had notice of that mutual understanding of the terms of the contract.

To the exact contrary, the provisions of Sections 1233 to 1239 of the Civil Code (Appendix I, *infra,* taken together, *strongly emphasize* that it is the *intention* of the parties which is to govern.

[redacted]

Point II

And the Court also clearly misapplied Section 1759 of the Civil Code (Appendix I, *infra,* p. 35) in saying that (R. 41), "according to Section 1759 of the Civil Code the mortgage is essentially indivisible", and thereupon concluding, without further discussion, that (R. 41, *supra*): "The option to sell and lease was substantially part of said contract, and, therefore, it was inseparable from the mortgage".

A. In support of this proposition the Court quotes

Llinas v. Mariani, 47 P. R. R. 543; *Montilla v. Van Syckel et al.*, 8 Puerto Rico Rep. 153; and *Puente v. Perez et al.*, 7 Puerto Rico Rep. 181; *none of which remotely supports the Court in this proposition.* Nor does a full reading of Section 1759 itself. [It is copied at length in Appendix I, *infra*, p. 35]. It deals with the division of a mortgage debt into aliquot parts, among several holders (creditors), or among several debtors; and directs that even though the mortgage indebtedness be thus distributed, yet the mortgage securing it remains one and "indivisible", for the benefit of all of them.

B. So far as that section is applicable to this case at all, it would seem to mean that upon the partial assignment of the mortgage indebtedness, in 1933, to the Jose Tous Soto Heirs, the Mercado partnership expressly retaining a part of it—[the ¾ of 1% per annum out of the annual interest, with the obligation on its part to continue to collect the whole 9% semi-annual interest payments from the mortgagor, and to pay over the reduced amount of 8¼% to the heirs, but in absolutely guaranteed monthly payments, so as to produce a regular, and certain, monthly income for the heirs],—the mortgage securing the notes was not thereby divided up into aliquot parts, but still remained "indivisible" in the hands of the Mercado partnership for the benefit of all of the holders of the indebtedness. And that, of course, *a fortiori*, the wholly independent agreements embodied in the deed of March 23, 1932, in its clauses "Seventh" and "Eleventh", embodying respectively the option and the right to be asked to "consent" to any partition of the lands between the two sisters,—both these covenants running specifically, by name, to the Mercado partnership, and not, generally in favor of the holders of the indebtedness (the mortgage notes), as did clause "Second" of that deed (R. 325-326) which constituted the mortgage in favor of the holders of those "bearer" notes, whomsoever they might be,—remained undisturbed, and unaffected in any way, by the delivery of the "bearer" notes to the heirs.

C. Bearing this in mind it appears wholly consistent with the actual intention of the parties that there was no assignment of the mortgage itself outright, and no assignment of these clauses or covenants of the 1932 deed, to the heirs,—the purpose being, of course, to reserve the rights under those clauses, undisturbed, in the ownership of the Mercado partnership. And the assignment deed, assigning as it did only a portion,—[although, of course, by far the major portion],—of the mortgage credits to the heirs, and not specifically assigning the mortgage itself, nor any of the separate covenants in it, accurately expresses that limited purpose. It was accurately done; it was by no means slipshod work; it was good conveyancing. It is not to be read as carrying more than it actually said, and certainly not to the extent of interpreting it to transfer this independent property right in the option, which, most clearly, neither of the parties intended it should carry,—and thus to override, merely by implication, the actual intent of all the parties to it.

D. It should be borne in mind that the Jose Tous Soto heirs do not appear to have been in the farming business; so that the option right was of no value to them. It added nothing to the security of the mortgage. On the other hand, it was of great value to the permanency of the enterprise of the Mercado agricultural partnership to have the right to renew its leases on the lands it was cultivating,—or to buy them if they should be offered for sale,—on the same terms that anyone else might offer.

These circumstances are to be taken into consideration in interpreting the 1933 assignment, in arriving at the intention of the parties in executing it; as is directed by Section 1233 to 1241, inclusive, of the Civil Code of Puerto Rico (Appendix I, *infra*, pp. 34, *supra*).

Point III

And the Court erred again, equally, in ignoring the plain fact that, necessarily, if the 1933 assignment were actually

to be regarded as transferring this option right to the Jose Tous Soto Heirs, then it became and remained their property, and was such in 1937; and they were entitled to the notice under it.

A. The option was certainly not extinguished by the transfer. If it were to be considered as the property of the heirs, then they stood in the partnership's shoes in respect to it. Then they held the same right, and were entitled to the same thirty days notice of any proposed sale or lease, to which the Mercado partnership would have been, if the assignment had never been made. And moreover, since the partnership, on the face of the record, still retained, in any event, an aliquot part of the mortgage indebtedness [its ¾ of 1% per annum interest], it follows that it likewise still retained, *even on that theory,* the right to the thirty days' notice of any proposed sale or lease, and to receive that notice either directly or else through the heirs as the owners of the major portion of the indebtedness.

B. *And those facts, at least,* and in any event, *all of the parties to these proceedings,*—and the whole world,—*were bound to know,* from the face of the record in the Public Registry,—even if they should choose to close their ears and eyes to their actual knowledge which the Court finds they all really had, of the true intention of both parties to the assignment, to the contrary.

C. But no notice whatever of the proposed sale and lease of March 9, 1937, was given to the Jose Tous Soto Heirs, any more than to the Mercado partnership. Of course, if it had been, it promptly would have been transmitted by the heirs to the partnership, this petitioner; and the jig would have been up.

The heirs were just as carefully kept in the dark as was the partnership.

Point IV

And the Supreme Court of Puerto Rico similarly erred in approving and affirming the judgment and the opinion

of the District Court; and in holding that the [*supposed*] lack of notice of record of the fact of the reservation of the option, and of its continued ownership by the Mercado partnership,

> "entitled defendants to proceed as regards the plaintiff in accordance with their construction of the statute" (R. 487, *supra*),

despite the express finding of the District Court, quoted with approval by the insular Supreme Court itself (R. 481-482), that all of the defendants-respondents *actually did have full notice of that fact.*

B. Under those circumstances, *what possible additional benefit could the defendants have received from having that same fact spread of record in the Public Registry,—the same thing which they already actually really knew* themselves, *as the court itself had just found* in approving the "Findings of Fact" of the District Court. And yet, the insular Supreme Court holds (R. 487 *supra*):

> "If the plaintiff when assigning its promissory notes to the Heirs of Tous Soto had expressly reserved to itself the right of option and *if when recording the assignment it had recorded such reservation in the registry, then it would have been entitled to claim knowledge of such reservation on the part of defendants with all the consequences that might arise as against them.* The record of the original contract in the registry and that of the second contract without any reservation in regard to option, entitled the defendants to proceed as regards the plaintiff in accordance with their construction of the statute." (*Italics supplied.*)

C. It is respectfully submitted that that holding is simply and plainly, "inescapably wrong"; "patently erroneous". It is gravely unjust; and should be reversed.

SECOND

Point V

Rule 39(b) of the Circuit Court of Appeals for the First

Circuit, quoted in the Petition (*ante*, p. 2), is invalid; and its application by that Court in this case, by dismissing the appeal from the Supreme Court of Puerto Rico, without giving appellant, this petitioner, an opportunity for a full hearing and argument, in the same way in which that court hears appeals within its jurisdiction coming from other courts, was a denial of due process of law and of the equal protection of the laws. This point has already been discussed in the Petition ("Petitioner's Position", *ante*, Petition, pp. 15-19).

CONCLUSION

The decision of the Supreme Court of Puerto Rico, affirming the judgment of the District Court of Ponce, was clearly wrong, and should be reversed; and the action or judgment or order of the Circuit Court of Appeals for the First Circuit, dismissing, under its Rule 39(b) the appeal to it, and affirming the judgment of the insular Supreme Court *pro forma*, without full hearing and argument, was likewise erroneous and a deprivation of petitioner-appellant's constitutional rights to due process of law and to the equal protection of the laws; and should likewise be reversed.

The writ of certiorari should be granted, and upon argument the judgments, as well of the Circuit Court of Appeals as also of the Supreme Court of Puerto Rico, and of the District Court of Ponce, should be reversed; and this case remanded with directions to grant the prayers of petitioner's original complaints in the District Court. Or else, in the alternative, the writ of mandamus should issue to the Circuit Court of Appeals [or that Court should be directed in these certiorari proceedings] to set aside its order or judgment of August 23, 1943, which affirmed *pro forma* without full hearing the judgment of the insular Supreme Court, and to proceed to hear upon full briefs and argu-

ment, and in the same way in which it hears appeals coming from other courts within its jurisdiction, and to consider and decide this case upon the merits.

Respectfully submitted,

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APPENDICES

APPENDIX I

Constitution and Statutes

CONSTITUTION

Article III. Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article IV. Section 3; Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;

Fifth Amendment. No person * * * * * * nor be deprived of life, liberty, or property, without due process of law.

FEDERAL

Organic Act for Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat., 951.

Sec. 2. That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property, without due process of law, or deny to any person therein, the equal protection of the laws.

Judicial Code, Sec. 128(a). The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts * * * * *

Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000.00, and in all habeas corpus proceedings. (As amended by Act of February 13, 1925, c. 229, 43 Stat. 936.)

PUERTO RICO

Civil Code. (Edition of 1930.)

Sec. 1233. If the terms of a contract are clear and leave

no doubt as to the intentions of the contracting parties the literal sense of its stipulations shall be observed.

If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail.

Sec. 1234. In order to judge as to the intention of the contracting parties, attention must principally be paid to their acts, contemporaneous and subsequent to the contract.

Sec. 1235. However general the terms of the contract may be, there should not be understood as admitted therein things and cases different from those with regard to which the persons interested intended to contract.

Sec. 1236. If any stipulation of a contract should admit of different meanings, it should be understood in the sense most suitable to give it effect.

Sec. 1237. The stipulations of a contract should be interpreted in relation to one another, giving to those that are doubtful the meaning which may appear from the consideration of all of them together.

Sec. 1238. Words which may have different meanings shall be understood in that which may be most in accordance with the nature and objects of the contract.

Sec. 1239. The uses or customs of the country shall be taken into consideration in interpreting ambiguity in contracts, supplying in the same the omission of stipulations which are usually included.

Sec. 1240. The interpretation of obscure stipulations of a contract must not favor the party occasioning the obscurity.

Sec. 1241. When it should be absolutely impossible to decide the doubts by the rules established in the preceding sections, if they deal with incidental circumstances of the contract, and said contract involves a good consideration, they shall be decided in favor of the smallest transmission of rights and interest. Should the contract involve a valuable consideration, the doubt shall be decided in favor of the greatest reciprocity of interests.

Should the doubts, the decision of which is referred to in this section, involve the principal object of the contract so

that the intention or will of the contracting parties can not be ascertained, the contract shall be void.

Sec. 1418. The sale or assignment of a credit includes that of all the accessory rights, such as the security, mortgage, pledge, or privilege.

Sec. 1759. The pledge and the mortgage are indivisible, even if the debt should be divided among the legal representatives of the debtor or of the creditor.

Therefore, an heir of the debtor who may have paid a part of the debt can not request that the pledge or mortgage be proportionally extinguished as long as the debt has not been paid in full.

Neither can the heir of the creditor, who received his part of the debt, return the pledge nor cancel the mortgage to the prejudice of the other heirs who have not been paid.

From these provisions is excepted the case in which there are several things given in mortgage or pledge and each of them secures only a specified part of the credit.

The debtor in such case shall be entitled to have the pledge or mortgage extinguished in proportion as he pays the part of the debt for which each thing is specially liable.

MORTGAGE LAW

Section 152. A mortgage credit may be conveyed or assigned to a third person in whole or in part, provided it be effected by means of a public instrument, notice of which is given to the debtor, and that it be recorded in the registry. The debtor shall not be bound by said contracts to any further extent than he was by his own.

The assignee shall be subrogated to all the rights of the assignor.

Sec. 153. In a mortgage constituted to secure obligations transferrable by endorsement or documents payable to bearer, when the mortgage interest is conveyed or assigned, it shall be understood that the latter is conveyed, together with the obligation or document, without the necessity of the debtor being advised thereof, or the transfer being recorded in the registry.

Law of Evidence (Rev. Stats. and Codes of 1911; Pars. 1394-1396).

Sec. 26 (Par. 1394). In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been ommitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible to be adopted as will give effect to all.

Sec. 27 (Par. 1395). In the construction of a statute, the intention of the Legislature, and in the construction of an instrument, the intention of the parties, is to be pursued, if possible; and when the intention of a general provision and that of a particular one are inconsistent, the latter is paramount to the former.

Sec. 28 (Par. 1396). For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

APPENDIX II

Chronological Analysis of the Facts

The underlying facts are substantially as follows:

1. On March 23, 1932, respondent, Mrs. Elvira Olivieri Commins, a divorcee, borrowed $41,256.89 from this petitioner, Mario Mercado e Hijos, "an agricultural civil partnership" of Ponce, for which she executed four promissory notes, each dated that day, and payable March 23, 1939, seven years after their date, "to the holder by endorsement of this promissory note" (Complaint, R. 2-3; "Exhibit J", R. 322, 324-325.) As security for the loan she executed "a voluntary mortgage", "to secure all and each of the promissory notes" (R. 2-4; 325-326), upon her undivided one-half interest in two estates then owned jointly by herself and her sister Santia, and known as "Los Indios" and "Juanita".

2. At that time, both of those estates were under ten-year leases to this petitioner partnership, Mario Mercado e Hijos, made back in 1927 and in 1928, respectively; and this petitioner also owned other lands of its own adjoining them,—its "Rufina" plantation ("Central Rufina"), and others, as is indicated by the recorded descriptions of the boundaries of the estates, "Los Indios" and "Juanita" ("Exhibit J", *supra;* R. 322-323).

3. Under those circumstances, there were inserted, in the same public deed by which the mortgage was constituted, two *independent clauses* running specifically,[1] person-

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[1] UNLIKE THE GENERAL CLAUSE "*second*", constituting the mortgage, and which made to run, not to this petitioner by name, nor to anyone else in particular; but, generally, "to secure all and each of the promissory notes referred to in the foregoing clause" [notes payable to the "holder by indorsement", whoever he might be, without naming any specific payee]—in whomsoever's hands they might be,—without specifically naming any mortgagee.

ally, to this petitioner-plaintiff partnership, Mario Mercado e Hijos, by name, and reading, respectively, as follows:

"Seventh

"Option to Purchase and Sell and to Lease:—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates 'Indios' and 'Juanita' upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee." (R. 4-5, 327)

"Eleventh

"The parties likewise agree that the actual partition of said estates cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force." (R. 5, 328)

4. The next year, on May 9, 1933 [while its ten-year leases of the lands were still in effect], by public deed, the petitioner partnership assigned the mortgage credits of $41,256.89 to the heirs of Jose Tous Soto, deceased, "through the proper endorsement and delivery by the plaintiff to the aforesaid heirs of the four mortgage credits" (Complaint, R. 5). *But the deed* of *"Assignment of Mortgage Credit"*, put in evidence by the respondents themselves,[2] recorded in the Public Registry on May 26,

[2] Defendants' "Exhibit 2" (R. 397-412).

1933 (R. 411-412), *shows on its face that this assignment* of the mortgage credits *was not an outright assignment of the whole deed by which the mortgage* securing the notes, in whosoever's hands they might be, *was constituted;* but was an assignment only of a *partial interest* in the promissory notes, for which purpose, only, the notes were delivered to the purchasers, the heirs of Jose Tous Soto. Pertinent provisions in the deed of assignment are:

(a) This petitioner-plaintiff partnership, the assignor, is, expressly,

> "to *retain* ¾ of 1% annually of the aforesaid interest during the life of this mortgage, as a consideration, as above stated, of the obligation to be assumed in the next clause of this deed." (Clause "THIRD", R. 406-407; *italics supplied.*)

(b) Clause "FOURTH" provides (R. 407) that:

> "The partnership Mario Mercado e Hijos binds itself to pay to the assignees in *monthly installments* at the end of each month the interest on the mortgage hereby assigned at the rate of 8¼% annually." (*Italics supplied. That is to say, monthly payments* at the rate of 8¼% per annum; *instead of the semi-annual payments* at the rate of 9% per annum stipulated in the promissory notes themselves. *Confer* R. 325, 401).

(c) The petitioner partnership Mario Mercado e Hijos, also *absolutely guarantees* (Clauses "Fifth", "Sixth" and "Eighth"; R. 407-408), not only the payment of the monthly installments, but also of the principal and interest of the mortgage debt in full, and also of all taxes, excises or imposts that might be levied on the principal or the interest by either the Federal or the Insular Government or any Municipality.

(d) *There is no express assignment of the rights given directly to the partnership* Mario Mercado e Hijos *by*

clauses "Seventh" and "Eleventh", above quoted, of the original mortgage deed of Mrs. Commins of March 23, 1943, *supra*,—the clauses securing the partnership's right or option to purchase or lease the lands at the same figure that might be offered by anybody else, and forbidding their partition between the two sisters without its consent.

(e) Nor was there, on the face of the document, any express outright assignment of the deed of mortgage itself, but only (Clause "First", R. 406) of "the mortgage credit constituted by the deed";—"the assignor subrogating the assignees to its rights in the same degree and priorities by delivering to them in this act and in my presence and that of the witnesses *the four mortgage promissory notes* above mentioned duly endorsed." (*Italics supplied*).

5. In other words, upon the face of that deed of assignment, May 9, 1933, as it appears recorded on the Public Registry a few days later, May 26, 1933, *supra*, it apparently contemplated that this partnership, the assignor, holding the leases on these lands, as it then did, should continue to collect the interest from the mortgagor, at the stipulated rate of 9%, *in her semi-annual payments* as they fell due; but that, without regard to the dates of those semi-annual payments, *the partnership* should, *in monthly payments*, which it absolutely guaranteed—[and guaranteed, also, against any diminution through taxes, federal or insular],—provide a monthly income for the heirs of Jose Tous Soto, at the rate of 8¼% per annum on the amounts of the original mortgage notes; and that it should itself "*retain ¾ of 1%*" per annum, "*as a consideration*, as above stated, *of the obligation*" (R. 407 *supra*) thus assumed by the partnership.

This apparently means that the partnership still *retained* a live, *active interest in the whole deed* securing the notes. It retained the *right and the duty to collect the interest, semi-annually*, from the mortgagor, and to pay it over to the assignees *in the monthly installments at a lesser rate, which it absolutely guaranteed;* and the express right, "as

a consideration" for all these obligations it was thus assuming, *"to retain"* for itself the difference of ¾ of 1% in the annual interest.

And thus retaining this active interest, *no outright assignment* was made of the whole original mortgage deed; —and no assignment of the partnership's rights in the lands under clauses "Seventh" and "Eleventh" of that original deed.

6. *That such was the understanding in fact,*—and specifically that the option rights under clause "Seventh" of the March 23, 1932, mortgage, remained in the hands of the partnership and were not assigned,—*was directly and positively stated by the Heirs of Jose Tous Soto themselves,* in a formal deed of "ratification", March 31, 1937 (petitioner, plaintiff's "Exhibit E", R. 281-286; and "Exhibit F", R. 286-302), as soon as the question was brought to their attention, in which the heirs formally stated with reference to that assignment of May 9, 1933 (R. 288-289) that it did not carry with it the partnership rights under clause "Seventh" of the 1932 mortgage, but that, directly to the contrary (R. 284):

> "Fourth,—It is set down by the parties hereto • • • that the conveyance of the Mortgage Credit constituted by Mrs. Elvira Olivieri Commins by means of deed No. 13, of March 23, 1932, • • • had for its exclusive aim the reception by the Heirs of Jose Tous Soto, parties hereto, of a fixed and certain rent, it being agreed that the said partnership Mario Mercado e Hijos would retain three-fourths of 1% of the interest agreed upon in the said deed of constitution of mortgage.
>
> "It was likewise agreed between the parties, in consideration of the solidary obligation assumed by the partnership Mario Mercado e Hijos; that such conveyance would not carry with it, and did not so carry, the right or rights constituted in favor of the said partnership Mario Mercado e Hijos in clause "Seventh" above transcribed of said deed of constitution of mortgage, said partnership reserving to itself, as it did reserve, the rights and obligation arising from said

clause during all the time that the said mortgage might be in force."

This "ratification" deed of the Heirs was formally ratified on behalf of one of them, a minor, and another one, of age but "incapacitated", by the District Court of Ponce, in guardianship proceedings, by an order April 7, 1937, after hearing evidence and a report of the District Attorney (Plaintiff's "Exhibit F", *supra;* R. 286-302).

6. Three years after such assignment of the "mortgage credits" to the Jose Tous Soto heirs, Mrs. Commins and her sister partitioned the estates "Los Indios" and "Juanita" between themselves by a formal deed of partition dated August 20, 1936 (Complaint R. 5-8; plaintiff's "Exhibit A" R. 225-259), recorded in the public Registry on March 1, 1937 (R. 257-259); and in that partition deed *it was the partnership Mario Mercado e Hijos,—[and not the Heirs of Jose Tous Soto, nor anyone on their behalf],—who appeared and gave their consent to the partition* under *paragraph "Eleventh" of the 1932 mortgage.* (Complaint, Par. 10, R. 8; and *express admissions* in the "Answers" of defendants-respondents; Answer, Par. "Tenth," R. 22; Answer, Par. "Sixth," R. 27). See also the District Court's finding to that effect ("Opinion", R. 38).

7. The District Court expressly finds ("Opinion"; "Findings of Fact", at p. 39) that:

> "It also appears to have been shown that both Elvira Olivieri Commins *and all the other defendants* in cases Nos. 311 and 312 were *advised, prior to the execution of the contract of sale and lease,* of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates Juanita and Indios".

8. Under these circumstances, on December 15, 1936, some two years and three months prior to the maturity of the seven-year mortgage notes given by her on March 23,

1932[4], Mrs. Commins, by letter to Mr. Mario Mercado, the managing director[5] of the petitioner-plaintiff partnership, said (R. 373-374);

> "My dear friend: In accordance with the conversation had by my son-in-law, Mr. Rafael Barletta, with the manager, Mr. Peralta, regarding" [*other matters not pertinent in this case*] * * *. "As soon as these holidays are over Don Rafael is going to talk business with you.

At that time the partnership was still the tenant of both estates as lessee under the old ten-year leases of 1927 and 1928 respectively; and, as above noted, the mortgage notes of 1932 still had considerably more than two years yet to run before their maturity on March 22, 1939.

8. The District Court further finds, in its "Findings of Fact", *supra* (at p. 39), that:

> "From the testimony of Elvira Olivieri Commins (page 81 of the transcript of record) it appears as a fact that she authorized her son-in-law Rafael Barletta to enter into negotiations with Mario Mercado e Hijos for the lease or sale of the estates Juanita and Indios.
>
> "From the testimony of Jose R. Peralta, manager of the plaintiff partnership (page 126 *et seq.* of the transcript of record) and from certain telegrams and letters mentioned in such testimony and which were admitted in evidence, it appears as a fact that from December, 1926, until May[6] 8, 1937, Rafael Barletta and the partnership Mario Mercado e Hijos held conversations and meetings in regard to the possible purchase and lease of the said immovables from Elvira Olivieri Commins to the plaintiff partnership".

9. In the meantime, apparently along sometime in Jan-

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[4] Maturing March 23, 1939 (R. 324).

[5] R. 168.

[6] "*May*" is a clerical error. It should read "*March* 8". [*Confer* testimony: Peralta, R. 145-146; Zapater, R. 181-183.]

uary or early in February, 1937, Mrs. Commins had a talk with her friend, Mrs. Elena Passarell-de-Delgado, "widow of Lluberas" (R. 166), whose husband, who had been a candidate for the Mayoralty of Ponce, had died. She is the mother (R. 104) of the respondents, Manuel Francisco Lluberas Passarell and his sisters, including Mrs. Celia Lluberas Passarell, the wife of the respondent, Emilio Blasini Totti; and is, therefore, the mother-in-law of that respondent, who, in turn, is a nephew of Mrs. Commins.

Dona Elena appears to have offered her friend, Mrs. Commins, "Dona Elvira", $40,000.00 for the part of the *"Indios"* estate that had come to the latter in the partition with her sister, Santia,—to buy it for the benefit of Dona Elena's son, Manuel Francisco Lluberas, and his sisters, Dona Elena's other children; on condition, however, that Mrs. Commins, "Dona Elvira", would also lease the other estate, *"Juanita"*, to her own nephew, the respondent, Dr. Blasini, son-in-law of Dona Elena, whose wife, Celia, is one of Dona Elena's children.

As to this, Mrs. Commins herself said, when asked about it in the presence of a stenographer during the notarial act of making formal demand upon her for rescission of the sale and the lease, on April 6, 1937 (R. 164-167), shortly before this litigation was begun (*Stenographer's notes;* R. 381-383):

> "A. When Dona Elena offered me $40,000.00 for the 'Indios', she asked me to lease her the 'Juanita' estate, for the benefit of her daughters, all this as a special concession in the event that she should buy the property. I accepted because in my opinion it was a good business, * * *. I also had my attorney * * *
>
> "Q. Who is your attorney? A. Sabater. Always when necessary he advises us.
>
> "Q. Cannot you remember whether this contract of sale was executed a month prior to March 9, 1937? A. I don't remember whether it was a month or twenty days' . . . Well, I had already given my word. You know I am very honest and my word is always made good. In this I take after my father.

"Q. Then, when you sold the 'Indios' estate, was it on condition that you should lease the 'Juanita' estate? A. Yes, sir. The 'Juanita' estate. I had already given my word."

"Q. Could you tell us the name of that person? A. Oh! That is my secret. I don't want to mention names."

* * * * *

"Q. Could you tell us something further in connection with said deal? A. If you want to know the details of that deal, why don't you go to the Registry?

(At this moment Dona Elvira personally reads clause 7 of the Notarial Act of Demand.)

"Q. From that clause you can see that you were bound to notify the partnership Mario Mercado e Hijos in the event that you proceeded to sell said estate. A. Yes, indeed. I always preferred him * * *.

"Q. And you * * * ? Did you sell without notifying Mario Mercado regarding the proposition to purchase, as stipulated in this clause? A. Well, as I had been told that he was not interested in the property and in those days I had a bronchitis attack, I was in bed, and moreover, I had already given my word * * *.

"Q. Who told you that? To whom did you give your word? A. Oh, well! That is a secret * * *. I don't want to mention names. I was under obligation for the favor that I had received and I will not, for any worldly consideration, let anybody be injured who had done me a great favor."

"Q. But Dona Elvira if you had notified Don Mario regarding said proposal they would have bought the estate from you upon the same terms and conditions. A. I don't know. Rafael told me that he had gone to see Don Mario (Don Marito) and that the latter was rude to him, saying that he was not interested in the property and that he should go to till it, a thing of which I would not have thought Don Marito capable, because I always preferred them and I even used to say that I would always prefer him. When told about that, I made up my mind to sell the 'Indios' estate and I leased the Juanita estate as a special condition, otherwise they would not have bought. * * * * * The agreement was to sell one and to lease the other.

"Q. And you did not notify the partnership Mario

Mercado e Hijos in that respect? A. Well, as he did not want it, I could not tell him anything * * * * *.

"Q. * * * * *.

"Q. Can you not remember more or less when it was agreed to sell the property? A. I cannot tell you exactly; it seems to me that it was at the time of Delgado's death. Oh, yes, I remember! It was about that time."

11. Thereupon Mrs. Commins and the other respondents proceeded to carry out the sale and lease in accordance with Dona Elena's offer. On February 25, 1937, a formal mortgage (R. 303-310; "Exhibit G") was put of record by which Mrs. Commins mortgaged to the respondent Manuel Francisco Lluberas Passarell, both of the estates, "Indios" and "Juanita" for an expressed $45,000.00 indebtedness and $900.00 attorneys' fees and costs and disbursements, but provided ("distribution of liens"; R. 308) that all except $5500.00 of the indebtedness should be charged against the various parcels of "Indios", leaving only $5500.00 against "Juanita"; and constituted the mortgagee, Francisco Lluberas Passarell, as her "special attorney-in-fact" (R. 309), to pay off the 1932 mortgage, and to retain the full amount of the $45,000.00 in his hands for that purpose, and afterwards to account to her for the balance left after clearing off such encumbrance. The loan recited in this mortgage (R. 307) was *to run for only six months*, with interest at 8 per cent per annum.

12. That new mortgage having thus been made, Francisco Lluberas Passarell paid the Jose Tous Soto heirs the $41,256.89, the principal amount of the 1932 mortgage [*two years before its maturity*], together with interest for three months in advance, and received from them a deed "of cancellation of mortgage", on March 8, 1937 ("Exhibit I", R. 312-321).

13. It appears from the "Stenographic Notes" (R. 444-447) in the guardianship proceedings, March 2 to March 5, 1937 (R. 425-451, Defendants' "Exhibit 4"), had upon the

petition of the guardian of two of the Jose Tous Soto heirs for permission to cancel the 1932 mortgage, that:

(1) Neither the guardian nor the Court was advised of the right to three months' notice before payment of the principal before maturity, under paragraph "Ninth" of the 1932 mortgage (R. 327) [On the contrary, the guardian and the Court were specifically advised that the payment could be made by the mortgagor at any time by simply paying three months' interest in advance (R. 446); and also that (R. 446),

> "if such cancellation is not made *a suit would ensue* which would cause inconvenience and expenses to the incapacitated ones" (*Italics supplied*);

(2) Nor reminded that under the assignment to the heirs from this petitioner Mario Mercado e Hijos of May 9, 1933, *supra, a proportionate amount of the three months' advance interest being paid clearly belonged to this petitioner* [its 3/4 of 1%, out of the 9% interest rate which the mortgage bore, expressly reserved to this petitioner by the assignment deed (Clause "Third", *supra*, R. 406-407)], and that, therefore, this *petitioner was entitled*—[for that reason alone, if for no other]—*to notice* of the proposed payment and cancellation of the mortgage;

(3) Nor reminded in any way of the option then in existence, and surely then being held, either by the heirs or else by this petitioner, under Clause "Seventh" of the 1932 mortgage deed.

The heirs' consent thus to accept the money and to cancel the mortgage, without any notice to this petitioner, appears, indeed, particularly from the "Stenographic Notes", to have been pushed through somewhat under pressure of the threat that, as above quoted, "*if such cancellation is not made a suit would ensue*",—a threat *for which there was most plainly no possible basis whatever.*

13. That cancellation of the mortgage having thus been secured on March 8, 1937, without any notice to the plain-

tiff partnership, and purposely, as it may fairly be said, "behind its back",[7] the respondents proceeded to execute and to put on record the new sale and lease from Mrs. Commins.

14 Promptly on learning of it, this petitioner made a formal demand for rescission and to be subrogated under its option to the rights of the new purchasers of "Indios" and of the new lessee of "Juanita"; and the demand being refused, deposited the purchase money in the District Court, in the same amount that had been paid by the new purchasers and lessee,[8] and began the present suits.

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[7] *Confer* the District Court's finding (R. 39) that during all that time, from the preceding December, 1936, onwards, Mrs. Commins, through her son-in-law Barletta, had been actively in communication with the petitioner partnership, "held conversations and meetings in regard to the possible purchase and lease of the said immovables"; and Barletta's numerous letters and telegrams to petitioner during all that time, making appointments and then making excuses to break them ("Exhibits" N, 0-1, 0-2, 0-3, 0-4, 0-5, and P, Q, R, and S; R. 371-373), and also the uncontradicted testimony of the petitioner's manager, Mr. Peralta (R. 145), that as late as March 8, 1937, *the very day that the cancellation of the mortgage was dated and was being put of record*, he had a talk with Barletta in the very office of the attorney, Zapater; "and he told me that he had in mind to see me on that day or the next day. * * * * * That the business was good and that he thought he could close it that afternoon or on the next day in the morning. He told me this in the presence of attorney Zapater." (R. 145, *supra.*)

And this was, in effect, corroborated by attorney Zapater himself, in his testimony (R. 179-181).

[8] Notarial Act, formal demand, testimony of attorney Porrata as to serving it (R. 164-168, with "stenographic notes" of statements made by Mrs. Commins on that occasion ("Exhibit U", R. 381-384). It was on that occasion that Mrs. Commins made the admissions hereinbefore quoted. (R. 381-383; *ante*, pp. 44-46).